United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

B p/s

76-1478

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellant, :

-against- : Docket No. 76-1478

AMREP Corporation, et al., :

Defendants-Appellees. :

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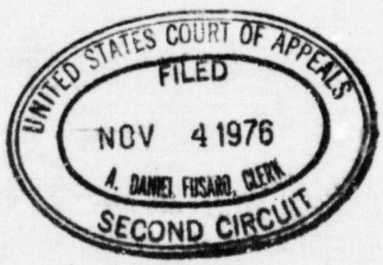
PETITION FOR REHEARING
AND A SUGGESTION FOR
REHEARING EN BANC



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PRELIMINARY STATEMENT

The appellees respectfully petition for rehearing, and suggest rehearing en banc, of the per curiam opinion, one judge dissenting, of a panel of this Court (Van Graafeiland, Lumbard, C.JJ., and Bonsal, D.J.), filed November 1, 1976, reversing a series of pretrial rulings of the United States District Court for the Southern District of New York (Metzner, D.J.) (1) precluding the government from offering proof on five allegations contained in the original indictment (75 Cr. 1023) but omitted from the superseding indictment (S 76 Cr. 644); (2) precluding the government from introducing certain portions of the grand jury testimony of one defendant, Solomon Friend, the corporate defendant's former general counsel; and (3) requiring the government to select the 20 of its 70 mail fraud counts on which it would proceed at trial.

REASONS FOR THIS PETITION

The rulings appealed from by the government were the product of numerous pretrial conferences held over many months in this complex criminal case. The government obtained appellate review of pretrial rulings which are clearly not appealable under the government appeals statute (18 U.S.C. §3731). It succeeded in reversing the trial court's sound discretionary rulings (without any showing whatever that such discretion was abused) through the use of a far more permissive standard than ever applied by this Court on review of the exclusion of evidence offered at trial by a defendant. It obtained a reversal of the trial court's rulings that one defendant's grand jury testimony was inadmissible under Bruton v. United States, 391 U.S. 123 (1968), despite the government's clear concession that the grand jury testimony in fact was to be used in violation of the Bruton principle. And it received an opinion of this Court written without benefit of an understanding of the complex factual issues in this case directing the admission of certain evidence at trial and in effect, usurping the proper function of a trial judge to make discretionary evidentiary rulings during what will be a long and complex trial.

The panel's opinion, if permitted to stand, will work incalcuable damage to the beneficial procedure of pretrial conferences in criminal cases mandated by Rule 17.1 of the Federal Rules of Criminal Procedure.

The precedent set by the panel's ruling here reversing numerous and minute discretionary pretrial rulings narrowing the issues by a trial court will severely discourage district court judges from attempting to "promote a fair and expeditious trial" (Rule 17.1, Federal Rules of Criminal Procedure) as Judge Metzner did here through pretrial conferences.

We accordingly urge reconsideration of the panel's opinion and suggest a rehearing en banc.

FACTUAL BACKGROUND

The Five Stricken Allegations

Since the return of the original indictment (75 Cr. 1023) on October 28, 1975, Judge Metzner has been seeking a way to limit the issues to be tried. The original indictment was in 80 counts, 42 pages long, and comprised 23 paragraphs and 104 subparagraphs. The trial court directed the government to streamline the issues for trial. Instead the government returned a superseding indictment. The government represented that the indictment had been "substantially pared down" and yet, despite numerous inquiries by the trial court as to how the scope of the indictment had been limited, the government steadfastly refused to specify any allegation or item of proof which had been eliminated by the superseding indictment.

On October 21, 1976, Judge Metzner identified five allegations which did not appear in the superseding indictment and asked the government to specify the paragraphs of the super-

seding indictment which would support proof of the omitted allegations. When the government was "unable to indicate any allegation in the superseding indictment which would embrace these specifications" (Order of Metzner, J., October 27, 1976) the judge ruled that evidence of the allegation contained in the old indictment but deleted in the new would be barred at trial.

The Designation of 20 Counts

The government has agreed to proceed on only 20 of the 70 mail fraud counts in the indictment. Its appeal from Judge Metzner's requirement that it designate which 20 mail fraud counts it would try was based on its objection that despite the 2 1/2 years this case had been under investigation, it "had not been able to personally interview all the victim witnesses, and therefore could not designate with certainty which it would call" (affidavit of Alan R. Kaufman in support of government's application for a stay of the trial, p. 8).

Thus, the government appealed not from the dismissal of the 50 mail fraud counts but rather from the requirement that it disclose its 20 victim witnesses in advance of trial as it was required to do with every other category of witness.

The Friend Grand Jury Testimony

Following the filing of extensive briefs by both prosecution and defense, Judge Metzner ruled on a line-by-line basis that certain portions of Friend's grand jury testimony was

inadmissible because it violated Bruton v. United States, supra, and because it was vague, cumulative, irrelevant, or misleading.

ARGUMENT

Point I

JUDGE METZNER'S PRETRIAL RULINGS ARE NOT APPEALABLE AND WERE ALL WITHIN HIS SOUND DISCRETION

The government appeals statute, 18 U.S.C. §3731, permits an appeal by the government from pretrial rulings "dismissing an indictment . . . as to any one or more counts" and "excluding evidence . . . [which] is a substantial proof of a fact material in the proceeding."

The government did not object and did not appeal from Judge Metzner's dismissal of 50 mail fraud counts. It did seek review, however, of the trial court's order that it designate which 20 mail fraud counts it would try--an order clearly not appealable under 18 U.S.C. §3731. Yet, this Court reversed the reduction of 70 counts to 20 counts, an order "[t]he Government did not oppose" (Kaufman affidavit, p. 8).

The individual items of evidence excluded are no more than cumulative proof of facts the government will prove through its hundreds of witnesses and thousands of documents. The evidence is not "substantial" proof of any "material" fact and no honest analysis of the government's allegations can result in defining these excluded items as "the heart" of the government's case.

Surely the government appeals statute was not intended to be triggered by every pretrial exclusion of government evidence amounting to no more than "nitpicks." The whole purpose of having pretrial conferences in criminal cases is to permit the trial judge who has intimate knowledge of the charges and facts to make discretionary rulings on evidence and witnesses "as will promote a fair and expeditious trial" (Rule 17.1, Federal Rules of Criminal Procedure). If every ruling excluding government evidence results in an appeal which in effect asks this Court to second guess the discretionary rulings of a trial judge, such discretionary rulings will only be made against the government during trial and the benefits gained by pretrial conferences will be lost.

The reversal of Judge Metzner's rulings in this case is particularly egregious. The trial court had the benefit of extensive briefing, argument, and an intimate knowledge of the facts of the case none of which was available to the panel which reversed him. Moreover, the rulings were solely within the discretion of the trial judge. And as this Court has ruled time after time on defendants' appeals raising a trial court's erroneous exclusion of defense evidence, the admission or exclusion of evidence is "subject to the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of clear abuse of that discretion." Hamling v. United States, 418 U.S. 87, 124-25, 127(1974); United States v.

Corr, ____ F. 2d ____, slip. op. 5891, 5909 (2d Cir. October 22, 1976); United States v. Gottlieb, 493 F. 2d 987, 992 (2d Cir. 1974); United States v. Catalano, 491 F. 2d 268, 273 (2d Cir.), cert. denied, 419 U.S. 825 (1974); Hardy v. United States, 335 F. 2d 288 (D.C. Cir. 1964).

The "nitpicks" excluded by Judge Metzner here hardly warrant the unfair application by this Court of a different standard (see Judge Bonsal's dissent from the panel's opinion, p. 3). For example, the government complains that the trial court excluded evidence of "Confidential Surveys," which the government says is "one way" of proving that the land was represented as a profitable financial investment. Among its more than 1,700 proposed trial exhibits, the government has hundreds of documents which are evidence of the representations made when selling the land and dozens of them deal with investment. Accordingly, it cannot be said that this ruling of the trial court deleted evidence which was "a substantial proof of a fact material to the proceeding."

Point II

IN REVERSING JUDGE METZNER'S BRUTON RULINGS, THIS COURT IGNORED THE GOVERNMENT'S CONCESSION THAT IT INTENDS TO UTILIZE FRIEND'S GRAND JURY TESTIMONY IN VIOLATION OF BRUTON

This Court reversed Judge Metzner's exclusion of portions of Friend's grand jury testimony and wrote:

> "The evidence is not so clearly inculpatory as to any of the co-defendants that it cannot be admitted . . .." (Per curiam opinion, p. 6.)

Aside from the fact that a particularly comprehensive understanding of the facts of this case was necessary to enable the trial court to understand the Bruton implications of the Friend grand jury testimony, an understanding which was impossible for this Court to have in the time devoted to this appeal and on the record before it, the government itself admitted that the testimony was inculpatory of other defendants. Thus, in a letter to this Court dated October 29, 1976, Assistant United States Attorney Alan R. Kaufman said:

> "The statements which we hope to use are statements which inculpate both Mr. Friend and the corporation." (Emphasis added.)

In addition to ignoring the government's fatal concession, this Court reversed Judge Metzner's ruling without the benefit of the Friend grand jury testimony which Judge Metzner ruled admissible. A few brief references to the facts in this complex and lengthy litigation cannot rationally serve as a principled basis for the reversal.

In this case the charge against the appellees is fraud in the sale of land. The major issue for the jury to decide is whether the land was misrepresented as a safe and secure investment when it was really a bad investment because there was no resale market. Solomon H. Friend was general coun-

sel to the corporate defendants. He joined AMREP in 1970, and the major thrust of his grand jury testimony was to shift the blame for anything arguably wrong to those who came before him in the company.

In his grand jury testimony, Friend says that he told the company that the land could not be sold with any reference to monetary rewards from the purchase of the land because there was no resale market for the land. If read in a joint trial the jury would hear the opinion of the legal advisor to the other defendants that the land should not have been advertised as a good investment because there was no resale market. No jury could be expected to then put this opinion out of mind when it deliberates the fate of those advised by Friend.

In the words of Judge Learned Hand, the cautionary instruction suggested by the panel (per curiam opinion, p. 6) would be no more than:

> " . . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." (Nash v. United States, 54 F. 2d 1006, 1007 [2d Cir. 1932]).

The passages in Friend's testimony on the lack of a resale market and on not advertising the land as a good investment deal with the very issues the jury must decide in this case and taken with the government's concession that the passages inculpate both Mr. Friend and the corporate defendants,

reconsideration of this Court's reversal is warranted.

Point III

THIS COURT MAY NOT USURP THE DISTRICT COURT'S POWER TO MAKE EVIDENTIARY RULINGS DURING THE COURSE OF A TRIAL

If this Court found Judge Metzner's pretrial rulings to be appealable and to be an abuse of his discretion--and we submit they were not--then a reversal was in order with, at the very most, a suggestion that Judge Metzner reconsider his rulings during the trial.

However, this Court has, in effect, ruled that the evidence excluded by Judge Metzner should be admitted during the trial no matter how prejudicial, irrelevant, or cumulative it may turn out to be as this trial unfolds. Such a ruling completely usurps Judge Metzner's function as a trial judge. He must have the power to exclude irrelevant evidence and even relevant evidence* "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Rule 403, Federal Rules of Evidence).

This Court's direction to Judge Metzner that the evidence he excluded "should be admitted" (per curiam opinion, p. 6)

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*The panel ayparently held that the excluded evidence was relevant and therefore "should be admitted and not excluded." (Per curiam opinion, p. 6.)

serves to bar Judge Metzner from properly functioning as a trial judge.

It is submitted that such a harsh result was not intended by this Court and should be corrected on rehearing.

CONCLUSION

Permitting the per curiam order of this Court to stand will establish an unhealthy precedent of interference with the necessary discretion invested in the district court for the conduct of a trial. Further, it will cause a severe chilling effect on the use of pretrial conferences to render complex and prolix trials more manageable and more just in their presentation.

The petition for rehearing and suggestion for rehearing en banc should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellant, :

v. : Docket No. 76-1478

AMREP CORPORATION, :
RIO RANCHO ESTATES, INC., AFFIDAVIT
ATC REALTY CORPORATION, :
HOWARD W. FRIEDMAN,
CHESTER CARITY, :
IRVING W. BLUM,
HENRY L. HOFFMAN, :
HERMAN B. OBERMAN,
SOLOMON H. FRIEND, and :
DANIEL FRIEDMAN,
:
Defendants-Appellees. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM R. GLENDON, being duly sworn, deposes and says:

1. I am a member of Rogers & Wells, counsel for appellee Solomon H. Friend, Esq., in these proceedings. I make this affidavit in support of the petition by the appellees for rehearing en banc of this Court's decision, filed November 1, 1976, which, by a 2 - 1 vote, reversed the holding of the District Court (Metzner, J.) as to several determinations which he made during pretrial conferences in this criminal case.

2. This reversal has significance reaching far beyond the four corners of this case. It may well reduce both the use and the import of pretrial proceedings in all criminal cases, thus directly contravening the spirit and provisions of Rule 17.1 of the Federal Rules of Criminal Procedure. That Rule, of course, was intended to "promote a fair and expeditious trial" through pretrial procedures. It was specifically designed to be used in complex "white collar" cases, as here. 8 Moore's Federal Practice - Criminal Rules ¶ 17.1.02[2][a].

3. I will not review all the particulars of the proceedings below, since this has been done by appellees elsewhere in their submission upon the instant petition. I do note, however, that the government's attempt in this Court to portray the action of the District Court as arbitrary is, simply, unfounded. It is important in this respect to bear in mind the circumstances faced by the District Court prior to making the rulings at issue. The initial indictment, covering 42 pages, had contained 110 specifications in 29 categories of purported misrepresentations and alleged fraudulent selling practices. And the government had filed a witness list of nearly 400 names and an exhibit list of approximately 1,700 documents, encompassing over 8,000 pages. Thus faced with a mass of allegations and proposed evidence, Judge Metzner conducted a series of pretrial conferences over several months in an attempt to help shape an

ordered trial. Nevertheless, the government's reaction to the Court's efforts was to erect an intractable stone wall.

4. It was apparent that the mass of evidence which the government proposed to offer at trial would be hearsay as to Mr. Friend and/or the other individual defendants, unless they were "connected" therewith. (For example, out of approximately 1,700 exhibits which the government had marked to offer upon its case in chief, less than 50 comprised writings of Mr. Friend.) The potential for real unfairness to the individual defendants was thus readily apparent. See United States v. Geany, 417 F.2d 1116, 1120 (2d Cir. 1969). Continued proffering by the government of documents which, at best, are of peripheral relevance would only compound this problem. Arguments as to admissibility and the like during the trial would only serve to confuse the jury further, thus exacerbating the unfairness already apparent. Judge Metzner's rulings at the pretrial conferences were at least a start in attempting to reduce the prejudice to the defendants, if it could be reduced at all. The rulings which the government now questions, far from being arbitrary, were a reasonable exercise of the Court's discretion.

5. Furthermore, aside from its effect upon the present case, the instant decision of this Court effectively gives the government a green light to appeal from virtually any evidentiary ruling made by a District Court in a pretrial conference, merely

by claiming that the excluded evidence related to a "crucial" part of the government's case. It is not unreasonable to assume that an Assistant United States Attorney (and particularly one who, as here, has lived with the case for nearly three years) would regard any document as "crucial" to the government's case. Unlike a narcotics case where the admissibility of "tainted" evidence could well be crucial to the prosecution, such circumstances would rarely arise in a large case. Certainly, they have not arisen here.

6. Pretrial proceedings are equally important in complex criminal cases as they are in large civil cases, where courts traditionally have had wide discretion in attempting to fashion pretrial rulings. The result of the subject reversal will be to curtail the benefits to be derived from pretrial proceedings in criminal cases, particularly large criminal cases. A trial court, I suggest, will be reluctant to use its authority over evidentiary and related matters if, as now appears to be the case, the government can simply traipse up to the Circuit Court upon any ruling adverse to its position. Such rulings would not be immediately appealable once the trial has commenced, and there is no reason why they should become appealable under 18 U.S.C. §3731 simply because they are made before, rather than after, the outset of the trial. Defendants, of

course, have no such right of interlocutory appeal and, by the end of the trial, if there is a conviction, they are invariably faced with arguments of "harmless error". I suggest there is no reason why the same procedure should not also apply to the government.

I therefore respectfully request that the Court rehear the instant question en banc.

William R. Glendon

Sworn to before me this

day of November, 1976.

Notary Public

BETTY B. ROBBINS
Attorney & Counsellor at Law
No. 4626239
Qualified in New York County
Certificate filed in [illegible] County
Commission Expires March 30, 1978

DOCKET NO. 76-1478 19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

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Defendants-Appellees.

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